

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-2560-99

CMBaerga

date:

to: District Director, Manhattan
ATTN: Mel Birnbaum, Team Coordinator

from: District Counsel, Manhattan

subject:

[REDACTED]
EIN: [REDACTED]
Taxable Years: December 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED].

Uniform Issue List # 6501.08-00; 6501.08-17

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This memorandum is in response to your request for advice concerning the proper entity to execute consents to extend the statute of limitations on assessment for the above-referenced taxpayer for the taxable years [REDACTED] through [REDACTED] and the proper language to be used in the consents.

The earliest statute of limitations on assessment is currently set to expire on [REDACTED].

ISSUES

1. What is the proper entity to enter into consents to extend the statute of limitation on assessment for the taxpayer, [REDACTED] [REDACTED] for pre-merger tax years with respect to Form 1042 Withholding tax under I.R.C. sections 1441 through 1464 for the taxable years [REDACTED] through [REDACTED]?

2. What specific language should be used on the consents to

extend the statute of limitations on assessment for [REDACTED]
[REDACTED] for the tax years [REDACTED] through [REDACTED]?

FACTS

On or about [REDACTED], [REDACTED] ("[REDACTED]"), a New York Corporation, and [REDACTED], a Delaware Corporation, ("[REDACTED]") entered into a Stock Purchase Agreement and a Trust Company Merger Agreement. Pursuant to the Stock Purchase Agreement, the applicable law is that of the State of New York. The Stock Purchase Agreement provided for the sale of [REDACTED]% of the common stock of [REDACTED] and [REDACTED] by [REDACTED] to [REDACTED] for \$[REDACTED].

Although we do not have a copy of the Trust Company Merger Agreement, the Stock Purchase Agreement indicates that immediately after the Closing on the stock purchase, [REDACTED], a New York Corporation, merged with and into [REDACTED]. The closing occurred on or about [REDACTED].

For the taxable years [REDACTED] through [REDACTED], inclusive, [REDACTED] (E.I.N. [REDACTED]) was the common parent of an affiliate group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. [REDACTED] was a member of this consolidated group. Prior to the merger at issue here, on or about [REDACTED], [REDACTED], a Delaware corporation and [REDACTED], a Delaware corporation entered into an Agreement and Plan of Merger. The Plan of Merger was amended [REDACTED] and the merger was effective on [REDACTED]. Pursuant to the Merger Agreement, [REDACTED] merged with and into [REDACTED]. The name of the surviving corporation is [REDACTED].

DISCUSSION

1. In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. section 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. The Form 872 ("Consent to Extend the Time to Assess Tax") is the form generally used by the Service to extend the statute of limitations on assessment.

██████████ was a member of a consolidated group during the years at issue. Under I.R.C. section 1501, consolidated returns may be made only with respect to chapter 1 taxes (income taxes) and not chapter 3 taxes (relating to Form 1042 under I.R.C. sections 1441 through 1464), the taxes at issue here. Form 872, Consent to Extend the Time to Assess Tax is used to extend the statute of limitations for Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons.

Each corporation subject to withholding for U.S. source income of foreign persons must execute its own 1042 and corresponding Form 872 regardless of whether it joins in filing a consolidated income tax return. Therefore, even though ██████████ was a member of a consolidated group for the years at issue, it would still be treated as a separate member for the purposes of the above withholding taxes.

Although we do not have a copy of the merger agreement and have not been able to obtain one through public sources, the Stock Purchase agreement indicates and ██████████ has represented, that as a result of the ██████████ merger ██████████ ceased to exist as it was merged into and became part of ██████████. Without the specifics of the merger, we can only address the applicable law on a general basis. Both ██████████ and ██████████ company are New York corporations. Generally, under New York law, in a merger "the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it; the continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by the statute. Matter of Bergdorf, 149 App. Div. 529, 133 N.Y.S. 1012, affirmed 206 N.Y. 309. Under this scenario the consent to extend the statute of limitations on assessment of withholding taxes would be executed by the surviving corporation, ██████████.

2. The appropriate language to use in the preparation of the consent to extend the time to assess for ██████████ for the years ██████████ through ██████████ (Form 872) is:

"██████████ (E.I.N. ██████████), as successor in interest to, by way of merger with ██████████ (E.I.N. ██████████)".

██████████ has provided a copy of ██████████'s signing authority resolution with an attached designation of tax signatories that was executed in ██████████ after ██████████'s merger with ██████████. You will need to verify that this signing authority resolution is still in effect. Otherwise, an appropriate officer of ██████████ may execute the consent pursuant to I.R.C. § 6062.

Should you have any questions regarding this matter, please contact the undersigned at (212) 264-5473 ext. 292.

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